United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7213

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FOR THE SECOND CIRCUIT

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SEP 8 1977

JOHN ESPOSITO,

Plaintiff-Appellee,

—against—

UNITED STATES NAVIGATION INC.,

—and—

SCINDIA STEAM NAVIGATION CO. LTD.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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TABLE OF CASES

PAGE

Blair v. United States Steel Corp., 312 F. Supp 293 (W. D. Pa. 1970), aff'd 444 F.2d 1390 (3 Cir. 1971), cert. den. 404 U.S. 1018 (1972), reh. den. 405 U.S. 948 (1972) 2

Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5 Cir. 1970), remand. 404 U.S. 1009 (1972), 457 F.2d 343 (5 Cir. 1972), cert. den. 409 U.S. 1012 (1972) 3, 4

Gutierrez v. Waterman S.S. Co., 373 U.S. 206 (1963), reh. den. 374 U.S. 858 (1963) 3, 4

Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3 Cir. 1963) 3

Marstaller v. Albina Dock Co., 191 Ore. 145, 229 P.2d 269 (Sup. Ct. Ore. 1951) 2

Pennsylvania Railroad Co. v. McAllister Bros., 137 F. Supp. 788 (S.D.N.Y. 1956), aff'd 240 F.2d 423 (2 Cir. 1957) 2

Victory Carriers v. Law, 404 U.S. 202 (1971), reh. den. 404 U.S. 1064 (1972) 3, 4

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Appellee's brief misconceives distinguishable cases and relies on disapproved, reversed opinions.

Straining to supplement Judge Mishler's opinion by concocting a negligent "act" for which Scindia might be held secondarily liable, appellee imaginatively asserts that "Navigation had dominion over a 'monster' and was indifferent that harm might befall one of the longshoremen compelled to work aboard her." (brief p. 14). But Judge Mishler properly found, virtually on concession (SM 5, 11), "that the defect in the beams supporting the deck could not be discovered by a reasonable inspection" and thus "was a latent defect" (46a).

Appellee contends that *Pennsylvania Railroad Co.* v. *McAllister Bros.*, 137 F. Supp. 788 (S.D.N.Y. 1956), aff'd per curiam 240 F. 2d 423 (2 Cir. 1957), "holds a demisee personally liable for an undiscovered latent unseaworthiness existing before the demise" (brief p. 16). In truth, the liability issue pertained to unseaworthiness "arising after the charter", 137 F. Supp., p. 790, the owner's defense being that its seaworthiness warranty to the charterer "does not extend beyond delivery and that it is insulated from any liability to the charterer for any condition of unseaworthiness arising thereafter", 137 F. Supp., p. 792. The Railroad "as charterer had the use of the barge continuously for one year prior to the accident", 137 F. Supp., p. 790, and Judge Weinfeld held that the unseaworthy "condition existed for a sufficient time prior to the accident to charge notice" by the Railroad, 137 F. Supp., p. 791.

In *Marstaller* v. *Albina Dock Co.*, 191 Ore. 145, 229 P. 2d 269 (Sup. Ct. Ore. 1951), the patently unseaworthy condition of uncovered hatch openings also arose after the demise, as did the unseaworthy poorly illuminated deck ice in *Blair* v. *United States Steel Corp.*, 312 F. Supp. 293 (W.D.Pa. 1970), aff'd per curiam 444 F. 2d 1390 (3 Cir. 1971), cert. den. sub nom. *United States Steel Corp.* v. *Blair*, 404 U.S. 1018 (1972), reh. den. 405 U.S. 948 (1972), where the demisee's employees were responsible for maintaining, pumping, lighting, securing, and shifting the barge, 312 F. Supp., p. 296, there being no barge captain employed by the owner to perform those tasks, as in the case of P-98 (27a-28a).

Appellee's Point III (brief pp. 17-19) seeks an alternative to bolster Judge Mishler's erroneous determination that Scindia is liable "on the traditional concept of respondeat

superior. *** The undisclosed principal is liable for the acts of its agent performed within the scope of the agency." (45a). Judge Mishler did not hold Scindia liable for P-98's unseaworthiness on the impermissible ground that Esposito was helping discharge M/S *Jaladhanya.*

Gutierrez v. *Waterman S.S. Corp.,* 373 U.S. 206 (1963), reh. den. 374 U.S. 858 (1963), held a shipowner liable for injury to a dockman caused by leaking bags of beans which the shipowner negligently permitted to be discharged, on the ground, inter alia, that seaworthiness requires "that things about a ship ** [including] ** cargo containers, must be reasonably fit for the purpose for which they are to be used. *** A ship that leaks is unseaworthy; so is a cargo container that leaks.", 373 U.S., p. 213. The result, but not the rationale, in *Hagans* v. *Ellerman & Bucknall S.S. Co.,* 318 F. 2d 563 (3 Cir. 1963), is consistent with the *Gutierrez* decision. Mistakenly believing "that it is plaintiff's status, or relationship to the vessel which entitles him to maritime tort protection", 318 F. 2d, p. 568, a notion which *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 214, n. 14 (1971), reh. den. 404 U.S. 1064 (1972), later explicitly disapproved, *Hagans* held that a shipowner could be liable for injury to a pier warehouseman who slipped on sand which had spilled from broken bags being discharged from the ship and stacked in the warehouse.

As he did in a brief to Judge Mishler, appellee relies on the Circuit Court's opinion in *Chagois* v. *Lykes Bros. S.S. Co.,* 432 F. 2d 388 (5 Cir. 1970), without revealing that the Supreme Court remanded sub nom. *Lykes Bros. S.S. Co.* v. *Chagois,* 404 U.S. 1009 (1972), "for further consideration in light of *Victory Carriers, Inc.* v. *Law, ante,* p. 202."

In *Chagois,* the Circuit Court initially held that a dockman who was injured by a defective auger belonging to his stevedore employer, which the dockman was using to feed rice from a rail car into a marine leg to be loaded onto a ship, was helping load the ship and was therefore owed a warranty by the shipowner that the au[illegible] was seaworthy. "We agree with the district court that Chagois was participating in the work of loading the ship at the time of his injury and thus that he was entitled to the protection of the doctrine of seaworthiness.", 432 F. 2d, p. 391. On remand, 457 F. 2d 343 (5 Cir. 1972), cert. den. 409 U.S. 1012 (1972), the Circuit Court reversed itself on the ground that in *Victory Carriers, Inc.* v. *Law,* "The Court rejected this Circuit's view that the critical question in these cases is whether the longshoreman is engaged in loading or unloading.", 457 F. 2d, p. 344.

The question in *Victory Carriers, Inc.* v. *Law* was whether federal maritime law or state law governed a driver's claim for injury caused by a defective forklift owned by the stevedore, which the driver was using to move cargo to the stringpiece to be loaded onto the ship, 404 U.S., pp. 202-203. After noting that "The Court has never approved an unseaworthiness recovery for an injury sustained on land merely because the injured longshoreman was in the process of 'loading' or 'unloading'.", 404 U.S., p. 211, the Court repudiated a loading/unloading criterion for the seaworthiness warranty, 404 U.S., p. 214, n. 14, and held that there was no federal maritime law warranty by the shipowner of the forklift's fitness because the forklift was not an appurtenance of the ship, 404 U.S., pp. 213-214, the distinguishing ground of the Court's decision in *Gutierrez* v. *Waterman S.S. Corp.,* which rested "upon the fact that his

injury was caused by an appurtenance of a ship, the defective containers", 404 U.S., pp. 210-211.

No decision, including Judge Mishler's, holds that a barge tied to a pier 15-25 feet astern of a ship (22a) is an appurtenance of the ship.

Conclusion

The judgment for plaintiff-appellee should be reversed, with direction to enter judgment for defendants-appellants.

Respectfully submitted,

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